Ketua Pengarah Kastam dan Eksais & Anor v Pioneer Technology (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–404 OF 2009

ZAINUN ALI, RAMLY ALI AND ABDUL WAHAB PATAIL JJCA

3 JANUARY 2013

Customs and Excise — Duty — Import duty — Whether manufactured goods released from licensed manufacturing warehouse ('LMW') for local market treated as imported goods on which import duty payable — Whether goods 'sold' by company's LMW to its own sales division for sale to local market required general expenses and profits of sales division to be added to ex-factory prices to calculate import duty — Whether reg 9 of the Customs (Rules of Valuation) Regulations 1999 applicable

The respondent manufacturer had a licensed manufacturing warehouse ('LMW') in Muar and sold its goods to a third party sole distributor for the local market. Under s 65A(3)(b) of the Customs Act 1967 ('Act') goods released from the LMW for the local market were treated as imported goods on which import duty and sales tax were payable. In such a case, the respondent was regarded as the 'exporter' of the goods and the distributor as the 'importer' and the price the respondent invoiced the distributor was the value of the 'imported' goods for purposes of calculating import duty and sales tax. The respondent later discontinued the third party arrangement and sold to the local market through its own sales division in Kuala Lumpur. Under this new arrangement the respondent declared the LMW's invoiced value to the sales division as the value of the goods for purposes of computing the 'import' duty. The Customs Department later notified the respondent that it had underpaid on customs duties in that as the same entity was both the buyer and the seller of the goods, the general expenses borne by the sales division formed part of the cost of production and sale pursuant to reg 9(3) of the Customs (Rules of Valuation) Regulations 1999 ('Regulations'). As such, the value of the goods 'imported' from the LMW should take into account general expenses of the sales division such as payroll, marketing and administration costs and the profits of the sales division. The respondent disagreed with this view and appealed to the High Court which held that the profits and general expenses of the respondent's sales division should not be added to the ex-factory prices to determine the customs value of goods released from the LMW for home consumption. The first appellant appealed against the decision to the Court of Appeal.

Held, allowing the appeal with costs, setting aside the order of the High Court and dismissing the respondent's cross-appeal for interest:

(1) Under s 65A(3)(b) of the Act where a manufacturer released manufactured goods from the LMW for home consumption, the customs duty on the goods was calculated as if the goods had been imported (see para 16(b)).

(2) Where the manufacturer was both exporter and importer because it sold for home consumption, the manufacturer operating an LMW was treated in the same position as an exporter of the goods selling into the home market in Malaysia. In such a case, the computed value for the purposes of customs duty was as provided in the Regulations (see paras 13–14).

(3) As the respondent's arrangement of selling through its own sales division was a departure from the norm it could have applied to the Minister, under the proviso to s 65A(3)(b), for exemption of duty payable on the basis the costs of administration and marketing for home consumption were purely local costs. The profits of the sales division could similarly have been exempted. But without such exemption being obtained, the customs duty on the goods would be calculated as if the goods had been imported (see para 15).

(4) As the respondent had no exemption and there was no transaction value (ie the invoiced value on goods sold by an exporter to an importer distributor) the customs value was determined under regs 7, 8 or 9 of the Regulations as applicable. Regulation 9 was applicable in this case and it included the payroll, marketing and administration costs and the profits of the respondent's sales division (see paras 16(d)–(h)).

[Bahasa Malaysia summary

Responden pengeluar mempunyai gudang pengeluaran berlesen ('GPB') di Muar dan menjual barang-barangnya kepada pengedar tunggal pihak ketiga untuk pasaran tempatan. Di bawah s 65A(3)(b) Akta Kastam 1967 ('Akta') barang-barang yang dikeluarkan daripada GPB untuk pasaran tempatan dianggap sebagai barang-barang yang diimport di mana duti impot dan cukai jualan dibayar. Dalam kes sedemikian, responden dianggap sebagai 'exporter' barang-barang tersebut dan harga yang diinvoiskan responden kepada pengedar adalah nilai barang-barang 'imported' bagi tujuan pengiraan duti import dan cukai jualan. Kemudiannya responden tidak meneruskan lagi dengan persetujuan pihak ketiga dan menjual kepada pasaran tempatan melalui bahagian jualannya di Kuala Lumpur. Di bawah persetujuan baru ini responden mengisytiharkan nilai GPB yang diinvoiskan kepada bahagian jualan sebagai nilai barang-barang bagi tujuan pengiraan duti 'import'. Jabatan Kastam kemudiannya memberitahu responden bahawa dia telah terkurang bayar duti kastam di mana memandangkan entiti yang sama adalah

kedua-duanya pembeli dan penjual barang-barang, pembelanjaan am yang ditanggung oleh bahagian jualan membentuk sebahagian kos pengeluaran dan jualan berikutan peraturan 9(3) Peraturan-Peraturan Kastam (Kaedah-Kaedah Penilaian) 1999 ('Peraturan-Peraturan'). Oleh itu, nilai barang-barang 'imported' daripada GPB patut diambil kira ke dalam akaun pembelanjaan am bahagian jualan sebagai gaji, pemasaran dan kos pentadbiran dan keuntungan bahagian jualan. Responden tidak bersetuju dengan pandangan ini dan merayu kepada Mahkamah Tinggi yang memutuskan bahawa keuntungan dan pembelanjaan am bahagian jualan responden tidak patut ditambah kepada harga-harga bukan kilang untuk menentukan nilai barang-barang kastam yang dikeluarkan daripada GPB untuk penggunaan rumah. Perayu pertama merayu terhadap keputusan Mahkamah Rayuan.

Diputuskan, membenarkan rayuan dengan kos, mengetepikan perintah Mahkamah Tinggi dan menolak rayuan balas responden untuk faedah:

(1) Di bawah s 65A(3)(b) Akta di mana pengeluar mengeluarkan barang-barang daripada GPB untuk penggunaan rumah, duti kastam ke atas barang-barang dikira seperti barang-barang tersebut diimport (lihat perenggan 16(b).

(2) Di mana pengeluar adalah kedua-dua pengeksport and pengimport kerana ia menjual untuk penggunaan rumah, pengeluar menjalankan GPB dianggap dalam kedudukan yang sama sebagai pengeksport barang-barang yang dijual ke pasaran tempatan di Malaysia. Dalam keadaan ini, nilai yang dikira untuk tujuan duti kastam adalah seperti yang diperuntukkan di dalam Peraturan-Peraturan (lihat perenggan 13–14).

(3) Memandangkan persetujuan responden terhadap menjual melalui bahagian jualannya sendiri adalah penyimpangan daripada biasa ianya boleh digunapakai kepada Menteri, di bawah peruntukan s 65A(3)(b), untuk pengecualian duti yang kena dibayar atas asas kos pentadbiran dan pemasaran untuk penggunaan rumah adalah semata-mata kos tempatan. Keuntungan bahagian jualan boleh dikecualikan. Tetapi tanpa pengecualian sedemikian diperolehi, duti kastam ke atas barang-barang akan dikira seperti barang tersebut telah diimport (lihat perenggan 15).

(4) Memandangkan responden tidak mempunyai pengecualian dan tidak terdapat nilai transaksi (iaitu nilai yang diinvoiskan ke atas barang jualan oleh pengekspot kepada pengedar yang mengimpot) nilai kastam ditentukan di bawah peraturan-peraturan 7, 8 atau 9 Peraturan-Peraturan seperti yang diaplikasikan. Peraturan 9 terpakai di dalam kes ini dan ia termasuk gaji, pemasaran dan kos pentadbiran dan keuntungan bahagian jualan responden (lihat perenggan 16(d)–(h)).]

Legislation referred to

Customs Act 1967 s 65A, 65A(3)(b), (4)
Customs (Rules of Valuation) Regulations 1999 regs 4, 5, 7, 8, 9(3)
Sales Tax Act 1972

Appeal from: Originating Motion No R2–25–36 of 2005 (High Court, Kuala Lumpur)

Nik Suhaimi bin Nik Sulaiman (Naziah Mokhtar with him) (Royal Malaysian Customs Headquaters) for the appellant.
Chu Ai Li (Khor Xiou Shan with her) (Azman Davidson & Co) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The *Ketua Pengarah Kastam dan Eksais* and *Kerajaan Malaysia* ('the appellant') had decided that in relation to payment of duties/taxes under the Customs Act 1967 and Sales Tax Act 1972 that:

> 3.1 Kaedah penilaian bagi barangan berduti yang dibawa keluar dan Gudang Pengilangan berlesen syarikat Pioneer Technology (Malaysia) Sdn. Bhd. kepada 'Sales Division' nya di Kuala Lumpur hendaklah menggunakan Kaedah Campuran di mana bagi mencapai nilai kastam melalui kaedah campuran tersebut hendaklah mengambilkira semua perbelanjaan am 'Sales Divison' Syarikat Pioneer Technology (Malaysia) Sdn. Bhd.

[2] The High Court, on 3 November 2009, allowed the appeal by Pioneer Technology (M) Sdn Bhd ('the respondent') against that decision of the appellant.

[3] The appellant appealed to this court.

BACKGROUND

[4] The respondent has a factory in Muar ('LMW') licensed as a licensed manufacturing warehouse pursuant to s 65A of the Customs Act 1967. The principal activity of the respondent is the manufacture of audio and video products and components and parts thereof.

[5] The application of s 65A(3)(b) means that if the respondent's goods are released from the LMW for the home consumption ie local market, import duty and sales tax shall be calculated on the goods on the basis as if such goods have been imported.

[6] Prior to 1 April 2000, the respondent 'sold' its goods for the local market

from the LMW to its sole distributor, Hwee Seng (Electronics) Sdn Bhd ('Hwee Seng'). In the customs declarations, the respondent was the 'exporter' and Hwee Seng the 'importer'. The price the respondent invoiced Hwee Seng was accepted as the value of the 'imported' goods for the calculation of import duty and sales tax.

[7] Subsequent to 1 April 2000, the respondent began to sell to the local market through its own sales division in Kuala Lumpur. The respondent informed the Royal Customs and Excise Department at Muar, Johor ('Muar Customs') of the arrangement and appended costs breakdown for the production costs of specific goods which also referred to as the ex factory price.

[8] Under this arrangement of 'importing' by its sales division from its LMW, the value of the goods stated for the purposes of import was the respondent's LMW's invoiced value to the respondent's sales division.

[9] A year later, after carrying out an investigation into the customs value declared by the respondent, the Muar Customs by letter 16 August 2001 claimed there had been an under payment of customs duties by the respondent. This was disputed by the respondent. By letter dated 16 September 2002, the customs headquarters in Kuala Lumpur stated that whilst the computed method was acceptable, the seller and buyer being the same entity, general expenses costs borne by the sales division outside the premises (the LMW) is part of the cost of production and sale pursuant to reg 9(3) of the Customs (Rules of Valuation) Regulations 1999 ('CRVR'). In other words, the value of the goods 'imported' from the LMW would take into account general expenses of the respondent's sales division. Therefore, payroll, marketing, administration and profits of the sales division would be added to the computed values submitted from the LMW.

ISSUE

[10] From the foregoing, it is our view the High Court formulated the issue it had to address correctly:

> Whether, for purposes of determining customs value of the respondent's goods that are released for home consumption from the respondent's LMW in accordance with the computed value under reg 9 of the CRVR, the appellant are entitled to include the Sales Division Profits and General Expenses (payroll, administration and marketing costs) to the ex factory prices of the respondent's goods?

[11] The High Court decided that the profit and general expenses of the respondent's sales division could not be added to the ex factory prices for the purposes of determining customs value of the respondent's goods that are

released for home consumption from the respondent's LMW.

REASONING AND CONCLUSION

[12] Section 65A(3)(b) provides the subject to sub-s (4) which does not apply in this case, if such goods are released from the warehouse for home consumption, the customs duty thereon shall be calculated on the basis as if such goods had been imported. The section does not contain the words 'from the warehouse' or 'from the warehouse licensed under section 65'. Instead, there is a proviso that the Minister may, in any particular case, exempt any person from the payment of the whole or part of such duty which may be payable by such person on any such goods and in granting such exemption the Minister may impose such conditions as he may deem fit.

[13] We observe also that the concept of the LMV is to provide a facility where a manufacturer can import free of customs duty raw materials and to export the manufactured goods. If the goods are sold for home consumption, the manufacturer is the exporter and the distributor for home consumption is the importer. We conclude, therefore, where the manufacturer is both exporter and importer because it also sells for home consumption, the effect of s 65A is that the goods sold for home consumption, then in the words of s 65A(3)(b) the customs duty on such goods shall be calculated on the basis as if such goods had been imported. That means that the manufacturer operating an LMW is treated in the same position as an exporter of the goods selling into the home market in Malaysia.

[14] In such case, the computed value for the purposes of customs duty is as provided by the Customs (Rules of Valuation) Regulations 1999 PU(A) 507/1999.

[15] The arrangement such as that made by the respondent to sell through its own sales division is a departure from the usual manufacturer from an LMW as exporter selling to an importer. The alternative arrangements can vary greatly. Alternative arrangements present an issue of an infinite variety of cost, pricing and profit transfers that the Act requires specific application for exemption to be made. An exemption can be justified on the basis that the costs of administration and marketing for home consumption are purely local costs. The profits of the local sales division could similarly be exempted. But without such exemption being obtained under the proviso to s 65A(3)(b), the customs duty of such of the goods released from the LMV to the warehouse will be calculated as if the goods had been imported.

[16] We sum up our conclusions as follows:

(a) the LMW is a facility to allow a manufacture to import raw materials without customs duty and to export free its products;

(b) where a manufacturer releases manufactured goods from the LMW for home consumption, the customs duty on the goods is calculated as if the goods had been imported;

(c) that s 65A(3)(b) does not provide any qualification to the phrase 'had been imported' must mean the goods shall be treated as any other goods imported into Malaysia;

(d) the rules of valuation of customs value provide that the primary basis of determination of customs value of imported goods is their transaction value: see reg 4. Thus, where the goods are sold by the exporter to an importer distributor, the transaction value is the invoice value with the adjustments under reg 5;

(e) where a manufacturer from an LMV sells to home consumptions he may seek exemption on that ground from the Minister;

(f) where such manufacturer has no exemption, the customs value is the transaction value as above;

(g) where such manufacturer has no exemption, and no transaction value the customs value is to be determined under regs 7, 8 or 9 as applicable; and

(h) regulation 9 is applicable in this case, and it includes the payroll, marketing, administration and profits of the sales division.

[17] We, therefore, allowed the appeal with costs, and set aside the order of the High Court. In the circumstances, the cross-appeal by the respondent in respect of interest for the prejudgment period must fall. We, therefore, dismissed the cross-appeal.

Appeal allowed with costs, order of the High Court set aside and respondent's cross-appeal for interest dismissed.

Reported by Ashok Kumar